

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Minority Television Project, Inc.)	CSR-8946-M
Licensee of Noncommercial Television Station)	MB Docket No. 17-313
KMTP, Channel *32)	
)	
San Francisco, California)	
)	
v.)	
)	
DISH Network L.L.C.)	

MEMORANDUM OPINION AND ORDER

Adopted: January 23, 2018

Released: January 23, 2018

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Minority Television Project, Inc., licensee of non-commercial television station KMTP-TV, Channel *32, San Francisco, California (KMTP) filed the above-captioned must carry complaint against DISH Network L.L.C. (DISH) pursuant to Section 338 of the Communications Act of 1934, as amended (the Act), and Section 76.66 of the Commission's rules for its refusal to carry KMTP on its satellite system.¹ In its complaint, KMTP alleges that DISH has failed to meet its must carry obligations under the Commission's satellite broadcast signal carriage rules by denying its election request for mandatory carriage.² DISH filed an opposition to the complaint claiming that it is not required to carry KMTP because the station's carriage election notice was defective. KMTP subsequently replied to the opposition.³ For the reasons discussed below, we deny the complaint because KMTP's election was improperly filed.

¹ 47 U.S.C. § 338; 47 CFR § 76.66; *see* Public Notice, Special Relief and Show Cause Petitions, Report No. 0461 (November 21, 2017) (Complaint).

² KMTP states that DISH is providing "local-into-local" satellite service pursuant to the statutory copyright license in the San Francisco-Oakland-San Jose designated market area (DMA). *See* 17 U.S.C. § 122(a); 47 U.S.C. § 339. A satellite carrier provides "local-into-local" satellite service when it retransmits a local television signal into the local market of that television station for reception by subscribers located in the market. 47 CFR § 76.66(a)(6). Under Section 76.66(m)(3) of the Commission's rules, a local television broadcast station that disputes a response by a satellite carrier that it is in compliance with its must carry obligations may obtain review of such denial or response by filing a "complaint," with the Commission in accordance with Section 76.7. 47 CFR § 76.7. Although styled a "complaint," a carriage complaint filed against a satellite carrier is treated by the Commission as a petition for special relief for purposes of the Commission's pleading requirements. *See 1998 Biennial Regulatory Review: Part 76 – Cable Television Service Pleading and Complaint Rules*, 14 FCC Rcd 418 (1999).

³ Opposition of DISH Network L.L.C. (Opposition), filed November 29, 2017; KMTP Reply (Reply), filed December 11, 2017.

II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (SHVIA),⁴ requires satellite carriers, beginning January 1, 2002, to carry on request all local television broadcast stations' signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.⁵ A station's market for satellite carriage purposes is its DMA, as defined by The Nielsen Company.⁶ In November 2000, the Commission adopted rules to implement the provisions contained in Section 338.⁷ Pursuant to these rules, television stations must request carriage, as required by SHVIA, by electing either retransmission consent or mandatory carriage with the satellite carrier serving their local market by October 1st of the year preceding each 3-year carriage election cycle.⁸ In the satellite carriage context, a station failing to make this election defaults to retransmission consent status.⁹ Pursuant to Section 76.66(d)(1)(ii) of our rules, a station's election request "must be in writing and sent to the satellite carrier's principal place of business, by certified mail, return receipt requested."¹⁰

3. In the instant case, the record indicates that KMTP sent DISH a timely letter "dated September 27, 2017, electing mandatory carriage for the election cycle that commences on January 1, 2018, and ends on December 31, 2020."¹¹ KMTP's letter included all of the information that is required by Section 76.66(d)(1) of the Commission's rules.¹² The letter was sent by Priority Express Mail.¹³ DISH received the letter, but rejected KMTP's carriage election letter with the following explanation: "[P]ursuant to federal regulations, elections for mandatory carriage must be sent by certified mail, return receipt requested. Your letter was sent to DISH by United States Postal Service Priority Mail, and therefore is not a valid election. As such, your election is rejected based on the foregoing."¹⁴ KMTP argues that DISH's rejection of its election letter was wrongful because "Certified Mail is a lesser

⁴ See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁵ See 47 U.S.C. § 338; 17 U.S.C. § 122. This requirement is commonly referred to as "carry one, carry all."

⁶ A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. See 17 U.S.C. § 122(j)(2)(A)-(C); see also *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1934 (2000) ("DBS Broadcast Carriage Report & Order"); 47 CFR § 76.66(e) ("A local market in the case of both commercial and noncommercial television broadcast stations, is the designated market area in which a station is located, and [i]n the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area within the same local market; and (ii) [i]n the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station.").

⁷ See generally *DBS Broadcast Carriage Report & Order*, 16 FCC Rcd at 1918. The Commission subsequently affirmed and clarified its carriage rules. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001) ("DBS Broadcast Carriage Reconsideration Order").

⁸ 47 CFR § 76.66(c)(4).

⁹ See 47 CFR § 76.66(c)(2) & (4).

¹⁰ See 47 C.F.R. § 76.66(d)(ii); see also *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16578, para. 70 (2001); *Family Stations, Inc. v. DirecTV* (Family Stations), 17 FCC Rcd 2365, 2370, para. 11 (2002), aff'd 19 FCC Rcd 14777 (2004); *Johnson Broadcasting of Dallas, Inc. v. DirecTV*, 17 FCC Rcd 886, 889-90, paras. 10-11 (2002).

¹¹ Complaint attachment (Letter dated October 9, 2017, from Teresa Cain, DISH Programming Locals Operations, to Booker Wade, KMTP-TV (DISH Letter)).

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Id.*

included service to Priority Express Mail,” and therefore is compliant with Section 76.66¹⁵ It further notes that “Priority Express Mail” did not exist when Section 76.66 was adopted and avers that DISH is “attempting to place form over substance by challenging the use of priority express mail.”¹⁶ In response, DISH maintains that, because the rule explicitly requires election notices to be sent by certified mail, return receipt requested, it is under no obligation to carry the station¹⁷ DISH also states that the Commission could have changed its rules for alternative service forms if it wanted to do so.¹⁸

III. DISCUSSION

4. Based on the record, we deny KMTP’s Complaint. As explained above, KMTP’s mandatory carriage election was sent to DISH by priority express mail, and the issue before us is whether it was proper for DISH to reject KMTP’s carriage election for this reason. We conclude that the rejection was permissible under our rules because KMTP did not adhere to the Commission’s clear and express procedural requirements regarding the manner in which carriage elections must be sent.

5. Section 76.66(d)(1)(ii) states that “an election request made by a television station must be in writing and sent to the satellite carrier’s principal place of business, by certified mail, return receipt requested.”¹⁹ In *Family Stations*, the Cable Services Bureau (Bureau) indicated that when the Commission adopted the *DBS Must Carry Report and Order*, the Commission “stated that contacting a carrier by certified mail is the notification method required to ensure that the broadcast stations are able to demonstrate that they submitted their elections by the required deadline, and that the satellite carrier received them.”²⁰ The Bureau also stated that the requirement that carriage elections be made by certified mail “provides assurances that satellite carriers are aware of their carriage obligations”²¹ and that, because satellite carriers are required to “contend with hundreds of elections and must carry requests from local stations,” a “bright line approach” was required to establish that an “election was mailed or received.”²²

6. Section 76.66(d)(1)(ii) provides one specific mailing method for carriage elections: certified mail, return receipt requested.²³ The provision does not indicate that this is a suggested method, or a preferred method, and we therefore need not decide whether priority express mail is an equivalent or better service, as KMTP suggests. Because KMTP failed to send its carriage election by the method

¹⁵ Complaint at 2-3. KMTP also asserts that “Priority Express Mail is not only a functional equivalent of Certified Mail, it is a superior service in that it provides next day delivery and it is traceable.” *Id.*, n. 2.

¹⁶ Complaint at 2. KMTP inexplicably misquotes in both its Complaint and Reply DISH’s October 9, 2017 response rejecting KMTP’s carriage election as deficient under the Commission’s rules. KMTP states that DISH described KMTP’s election letter as arriving via “Priority Express Mail, return receipt requested,” whereas DISH’s letter clearly states that KMTP’s election letter arrived via “United States Postal Service Priority Mail.” See Complaint at 1-2; Reply at 1-2. In any event, KMTP did not attach a copy of a return receipt with its complaint.

¹⁷ Opposition at 4.

¹⁸ *Id.* Finally, DISH argues that KMTP can still be carried on the cycle that begins January 1, 2018, if it chooses to initiate negotiations for retransmission consent. *Id.* KMTP states that it might be willing to enter into an agreement with DISH for carriage, but believes that DISH’s reliance on Section 76.64(a) of the Commission’s rules might be misplaced, because that provision only mentions commercial television stations as having a right to enter into retransmission consent agreements. Reply at 2-3. Because we dismiss the petition on other grounds, we need not address these arguments.

¹⁹ 47 CFR § 76.66(d)(ii).

²⁰ *Family Stations*, 17 FCC Rcd at 2378, para. 13. The Media Bureau is the successor to the Cable Services Bureau.

²¹ *Family Stations*, 17 FCC Rcd at 2377, para. 11.

²² *Id.* at 2378, para. 13.

²³ 47 CFR § 76.66(d)(ii).

required under our rules, we must deny its complaint.²⁴

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act of 1934, as amended, and Section 76.66 of the Commission's rules, that the must carry complaint filed by Minority Television Project, Inc., licensee of non-commercial television station KMTP-TV, Channel *32, San Francisco, California **IS DENIED**.

8. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckart
Senior Deputy Chief, Policy Division
Media Bureau

²⁴ The Commission recently issued a Notice of Proposed Rulemaking which initiated an inquiry into whether and how the Commission could update and simplify its carriage election procedures. *See Electronic Delivery of MVPD Communications; Modernization of Media Initiative*, MB Docket Nos. 17-317, 17-105, Notice of Proposed Rulemaking, FCC 17-168, at paras. 25-27 (Dec. 14, 2017), 2017 WL 6405716.